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IN THE

# Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Petitioners*,

v.

PROMETHEUS RADIO PROJECT, *et al.*,
*Respondents*.

**On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONSE OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO THE FEDERAL COMMUNICATIONS COMMISSION'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission's modifications to its regulations regarding local radio and local television ownership were not supported by reasoned analysis.

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## STATEMENT

The Federal Communications Commission's conditional cross-petition challenges the Third Circuit's conclusion that, under ordinary standards governing judicial review of administrative action, the FCC failed to justify certain aspects of its new broadcast rules governing ownership of local television and local radio stations. The arguments set forth in the FCC's filing vividly illustrate the extent of the Third Circuit's effort to arrogate to itself the right to set media ownership policy. *See* FCC Cross-Petition 21-28; NAB Petition (04-1033) 19-29. The National Association of Broadcasters ("NAB") thus does not oppose granting the FCC's conditional cross-petition.

NAB disagrees with the remainder of the Commission's contentions. In particular, as will be developed more in NAB's reply brief to be filed in 04-1033, the FCC has provided no compelling reason for denying NAB's petition. The defiance by the FCC and the Third Circuit of the judgments made by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 ("1996 Act"), merit this Court's attention, particularly in light of the contrary approach taken by the D.C. Circuit. Moreover, the rules that are the subject of NAB's petition are already in effect and are largely unaffected by the Third Circuit's remand, and thus the posture of the case counsels in favor of immediate review, not against it. Finally, NAB's petition should be granted irrespective of whether the Court believes the issues raised in the FCC's cross-petition warrant review.

## RESPONSE TO CONDITIONAL CROSS-PETITION[1]

NAB's petition challenges two aspects of the decision below: first, the Third Circuit's approval of changes to the FCC's local radio rules that forbid the common ownership and transfer of stations that would be permissible under the ownership levels established by Congress in the 1996 Act; and second, the decision to uphold the FCC's retention of a "top-4" television duopoly restriction, which forbids or sharply limits common ownership in many local television markets, including small and medium-sized markets where the benefits of common ownership are most needed. Each of these issues merits this Court's review now, quite apart from whether the Court believes that the FCC's conditional cross-petition should be granted.

### I. NAB's Petition Warrants Review.

Presaging arguments that it promises to develop more fully in its brief in opposition, the FCC argues that all of the petitions challenging the Third Circuit's decision should be denied. In particular, the Commission contends that the D.C. Circuit and the Third Circuit applied "the same standard" concerning the scope of the deregulatory mandate set forth in § 202(h) of the 1996 Act, FCC Cross-Petition 16, and that the petitions should be denied in any event because the case is in "an interlocutory posture," *id.* at 17.[2] Insofar as those arguments relate to NAB's petition, they are meritless.

1. The Third Circuit's refusal to read § 202 as a whole as placing any deregulatory "thumb on the scale" in connection

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[1] The background to the FCC's cross-petition has been set forth at length in NAB's petition in 04-1033, *see* NAB Petition 2-12, as well as in the other filings arising from the Third Circuit's decision below, and will not be repeated here.

[2] The Commission also addresses the constitutional arguments presented in the petitions filed by Media General (04-1020), the Tribune Co. (04-1036), and the Newspaper Association of America (04-1045). The arguments raised are beyond the scope of this opposition.

with the FCC's § 202(h) review of broadcast ownership restrictions warrants this Court's review.

The FCC argues first that the Third Circuit applied "the same standard" in this case that the D.C. Circuit applied in *Fox* and *Sinclair*. No reasonable reader of *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), and *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), however, could believe that the D.C. Circuit and the Third Circuit were applying the same standard. The D.C. Circuit in both *Fox* and *Sinclair* reviewed the Commission's rules with a skeptical eye to ensure that they were consistent with § 202's deregulatory mandate, and the court struck down all of the challenged regulations on the ground that the Commission had failed to explain why further deregulation was not proper. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair*, 284 F.3d at 159, 162-65. In contrast, the Third Circuit analyzed the FCC's order to ensure that it was not too deregulatory, demanding further explanation of how the adopted level of deregulation could be justified. Indeed, the Third Circuit chastised the FCC for failing to justify the deregulatory consequences of the Commission's decision to retain numerical station ownership limits established by Congress, Pet. App. 102a-106a, and it upheld even regulations that were more restrictive of common ownership than the floors that Congress had set in the 1996 Act, *id.* at 85a-90a.[3] The notion that the two courts were applying the same standard is not plausible.

Despite the blithe assertion by the FCC that the standards are the "same," there is little doubt that the "citizen petitioners" believed the D.C. Circuit had acknowledged the deregulatory mandate of the statute. Thus, when the media petitioners filed petitions for review in the D.C. Circuit, the

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[3] All appendix cites in this response are to the Petitioners Appendix in *Media General, Inc. v. FCC*, 04-1020.

citizen petitioners filed in the Second Circuit, the Third Circuit, and the Ninth Circuit in an effort (successful, as it happened) to obtain by appellate lottery a more favorable forum, and they actively opposed the efforts of the media petitioners and the FCC to transfer the case to the D.C. Circuit.

Moreover, even if the D.C. Circuit and the Third Circuit had applied "the same standard," the granting of NAB's petition is warranted. This Court has previously granted review without a split in cases presenting similar issues, including broadcast ownership cases and cases arising out of the 1996 Act. *See* NAB Petition 16-17. The media ownership rules at issue here are among the most important issues the Commission faces, as both the scope of and interest in the FCC's proceedings below make clear. The public interest plainly singles this case out as one worthy of this Court's attention, with or without a split.

Waiting for other courts to weigh in on the issues presented is particularly inappropriate here because, in an extraordinary action, the Third Circuit has expressly retained jurisdiction to review the FCC's order on remand. Pet. App. 12a & n.3. That is troubling because the Third Circuit's approach interprets § 202(h) as though unaffected by the rest of § 202. Section 202(h), however, is not a freestanding provision. It is instead an integral part of a provision, *every other part of which* is indisputably deregulatory. Indeed, virtually every subsection of § 202 reverses specific FCC ownership restrictions, many of which had reflected FCC policy for decades, in an effort to *expand* common ownership. To read § 202(h) as the Third Circuit did as merely the congressional equivalent of "same old, same old" cannot be squared with any reasonable approach to statutory interpretation.

This is especially the case with respect to NAB's challenge to the Third Circuit's treatment of the local radio

ownership rules, which turns on the construction of § 202 as a whole, not just § 202(h). Indeed, the core of NAB's position on local radio ownership is that the Commission's decision to go below the ownership floors set by Congress expressly in the 1996 Act violates both § 202(b) – which established those floors – and § 202(h). Nothing in the Commission's § 202(h) discussion thus provides a reason to deny that aspect of NAB's petition – as the Commission appears to recognize. *See* FCC Cross-Petition 13 n.4.

2. The Commission's alternative argument that the case is in "an interlocutory posture" similarly provides no basis for denying review. It is now nearly 10 years since Congress passed the 1996 Act to relax ownership restrictions in the multibillion dollar media industry, and there is *still* no settled understanding of the basic standards that govern the Commission's proceedings. The D.C. Circuit has characterized § 202(h) as embodying a deregulatory mandate akin to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')," *Fox*, 280 F.3d at 1044; the Third Circuit has interpreted § 202(h) as merely restating the usual deferential standards of administrative review, *see* Pet. App. 35a-36a. Moreover, it remains unclear whether § 202 as a whole permits the FCC to restrict common ownership below the floors set in the 1996 Act (as the Commission did here) or even (as the Commission apparently believes) to restore national ownership limits that the 1996 Act specifically abolished.

Waiting for further proceedings perpetuates this uncertainty. The FCC's early revisions of the ownership rules in response to the 1996 Act were vacated or remanded by the D.C. Circuit in *Fox* and *Sinclair* as insufficiently deregulatory; its subsequent efforts to remedy the D.C. Circuit's concerns were viewed by the Third Circuit as too deregulatory. Although the Commission may be willing to tolerate this state of affairs, it is the broadcasters and the

listeners and viewers they serve that suffer the consequences. The propriety of investments worth millions or even hundreds of millions of dollars are uncertain, and all the more so because the FCC has now imposed transfer restrictions even on station combinations that were properly formed under the ownership levels established by Congress in 1996. Common ownership that would have been permissible under a proper implementation of the 1996 Act and that would strengthen broadcasters and improve service to the public is thus deterred or precluded entirely. The Commission's suggestion that review should be delayed indefinitely so that the Commission and the Third Circuit can have yet another crack at the statute thus has little to recommend it.

Denying review on the ground that the case is interlocutory is particularly inappropriate with respect to the issues raised in NAB's petition. Unlike most of the new rules under consideration (which were stayed by the Third Circuit), the FCC rules challenged by NAB are fully in effect. The Third Circuit granted the FCC's request that the revised and more restrictive radio rules be exempted from the Third Circuit's general stay of the new media ownership regulations. And the top-4 television duopoly restriction is in place because the Third Circuit ordered the FCC to reinstate the very rule – containing that top-4 restriction – that the D.C. Circuit remanded as arbitrary and capricious in *Sinclair*. The exact restrictions challenged in NAB's petition are thus currently operating to prevent beneficial common ownership.

In any event, the Commission's interlocutory arguments are especially misplaced in the context of this case. With respect to the radio rules, for example, the Commission successfully sought specific relief from the Third Circuit's stay order so that the Commission could implement immediately the new local radio restrictions. For the Commission to claim now that review of these rules should

be further delayed because the order is interlocutory smacks of a bait and switch.

The situation is even more egregious with respect to the local television rule. The duopoly rule now in place is the very rule that the D.C. Circuit remanded as inconsistent with the 1996 Act in *Sinclair*. Further delay thus preserves a rule that was called into question three years ago.

It is thus misleading for the Commission to suggest that although the "old broadcast ownership rules . . . are now back in force due to the Third Circuit's stay of the Commission's new rules," those old rules "are not being challenged in this ongoing proceeding." FCC Cross-Petition 18; *id.* at 19. In fact, as discussed above, the "new" local radio rules described in NAB's petition *are* in effect and *are* being challenged in this proceeding. And the only reason the "old" local television rules are not being challenged is because those rules *have already been remanded* to the Commission by the D.C. Circuit.

Nor is it correct that these rules are "likely to be changed as the result of the remand proceedings." FCC Cross-Petition 18. The Commission reimposed the top-4 restriction after the D.C. Circuit in *Sinclair* struck down a television duopoly rule that contained the same provision; the Commission surely has little incentive to eliminate that rule now that the Third Circuit has explicitly blessed it. And it is unlikely that the Commission will alter its new method of defining radio markets or its transferability restrictions in light of the Commission's request for relief from the Third Circuit's stay precisely so that those new provisions could take effect immediately.

In short, the Court has before it one of the most hotly contested proceedings in recent memory. All segments of the industry participated, as did tens of thousands of individuals. In response to prior concerns expressed by the D.C. Circuit,

the FCC developed as extensive a record as possible, and all interested parties had the chance to place in the record the facts they found most persuasive. The Commission itself then gave full consideration to the issues in a lengthy order. Little is to be accomplished by waiting for further proceedings. If ever a Commission order were ripe for review, it is this one.

## II. The Court Need Not Grant The Commission's Conditional Cross-Petition In Order To Consider Fully The Issues In NAB's Petition.

1. The Third Circuit's decision reflects a hostility to deregulation and media ownership reform that the record does not warrant and that Congress did not share. As Chief Judge Scirica explained, the Third Circuit panel majority repeatedly substituted its judgment for that of the expert agency, particularly with respect to challenges that the FCC had allowed too much deregulation. The Third Circuit's decision thus cannot be squared with traditional principles of administrative law, much less the deregulatory mandate contained in § 202(h), as the FCC demonstrates in its conditional cross-petition.

NAB agrees, for example, that the Third Circuit's distrust of deregulatory policies enacted by Congress and pursued by the Commission led it to question the FCC's "line-drawing" to an extent that is inconsistent with traditional principles of judicial review. FCC Cross-Petition 27-28. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983); *National Broad. Co v. United States*, 319 U.S. 190, 224 (1943).

With respect to both the local radio rules and the local television rules, the panel majority remanded the numeric limits adopted by the FCC, largely because it viewed the resulting markets as too concentrated. The majority took the FCC to task with respect to the local television rules, for

instance, because the Commission failed to "ensure that markets would not exceed the Merger Guidelines' 1800 threshold for highly concentrated markets." Pet. App. 78a. And it likewise faulted the Commission's local radio limits – the very limits established by Congress – because they permitted markets with HHI concentrations "well above the Merger Guidelines' 1800 threshold for highly concentrated markets." *Id.* at 105a. Thus, despite the fact that the Commission expressly stated that it sought to avoid a "mechanical application of the DOJ/FTC Merger Guidelines," *id.* at 78a, and despite the FCC's statement (approved by the Third Circuit) that the FCC sought to consider a range of factors outside the scope of those relevant to the antitrust agencies, *id.* at 68a, the panel majority remanded the lines selected by the Commission because they resulted in concentration levels that the Third Circuit viewed as too high. *Cf.* Pet. App. 179a-190a (Scirica, C.J., dissenting) (explaining why the panel majority's analysis was misguided).

NAB also agrees that the Third Circuit majority unreasonably rejected the FCC's expert judgment as to the significance of the Internet to media diversity. FCC Cross-Petition 24-27. *See, e.g.*, *State Farm*, 463 U.S. at 43 (scope of agency review is "narrow and a court is not to substitute its judgment for that of the agency"); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978). Although the Third Circuit conceded that the Commission's survey "suggested that the Internet is a source of local news," Pet. App. 53a, the majority chastised the Commission, holding that the FCC "should have discounted" the survey responses because, in the majority's view, the Internet was not sufficiently shown to be a source of local news, *id.* at 54a-58a.

As Chief Judge Scirica noted, however, assigning the appropriate weight for a media service such as the Internet is

"as much art as science." Pet. App. 164a. Given the ample evidence in the record to support the weights assigned by the Commission, *see generally id.* at 164a-165a, the panel majority had no legitimate basis for questioning the FCC's conclusions. Indeed, as Chief Judge Scirica noted, the FCC likely *understated* the weight properly assigned to the Internet, in light of the explosive growth of, and the public's increasing facility with, that medium. There can be little doubt then that, as Chief Judge Scirica below and the FCC here have contended, the panel majority "substituted its judgment for that of the FCC." *Id.* at 160a.

2. Although NAB may not agree with the Commission's arguments in all their particulars, the errors identified by the FCC reinforce NAB's contention that the Third Circuit's decision cannot be reconciled with traditional principles of administrative review, much less the higher standard that Congress imposed in § 202(h). The issues raised by the Commission are thus consonant with, and reinforce, the principal points made in NAB's petition. Moreover, as noted, the Third Circuit has sought to assert jurisdiction over any order of the FCC on remand. For those reasons, NAB does not oppose the FCC's conditional cross-petition.

That said, it is not correct that granting the conditional cross-petition is necessary for this Court to consider the issues raised in NAB's petition. *Cf.* FCC Cross-Petition 19-20. The challenge to the Commission's revised radio ownership rules presented in NAB's petition is a purely statutory one: whether § 202 precludes the Commission from restricting station combinations to levels below those established by Congress in the 1996 Act. Resolution of that question does not require any resort to "detailed consideration" of the issues and evidence raised in the FCC's cross-petition. FCC Cross-Petition 20. NAB thus disputes the FCC's contention that there are no "practical reasons to refuse to consider" the FCC's petition. *Id.* The statutory

question presented by NAB is straightforward and largely independent of the voluminous factual record developed before the agency, on which the FCC's issues likely depend. Any concerns about the fact-specific and record-dependent nature of the issues presented in the cross-petition should have no effect on the decision to grant review on the local radio issue raised in NAB's petition.[4]

Similarly, the Court could well address NAB's challenge to the Commission's top-4 television duopoly rule without considering the range of issues in the cross-petition. The newspaper cross-ownership issues and the Commission's numerical limits on local radio station ownership are entirely irrelevant to the top-4 restriction. To be sure, there is some evidentiary overlap between the record relevant to NAB's challenge to the top-4 restriction and the other television-related issues raised in the cross-petition. But the core of NAB's challenge is that the top-4 restriction precludes or drastically limits combinations in the markets with the fewest stations. *See* NAB Petition 27 (noting that the top-4 rule prevents station combinations in 77% of the smallest markets). That restriction thus operates largely independently of the television numerical limits at issue in the FCC cross-petition, and NAB's challenge could certainly be resolved without addressing all of the issues the FCC raises.

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[4] Nor is their any basis for the FCC's assertion that the question whether the rules are supported by "reasoned analysis" is "logically prior" to the question of whether the rules are prohibited by statute. FCC Cross-Petition 20. There is no doctrine of "statutory avoidance," and reviewing courts will often review agency action for consistency with the statute without considering whether, assuming such consistency, the agency's application was supported by reasoned analysis. *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (step one of analysis is considering whether result is foreclosed by statute).

## CONCLUSION

NAB does not oppose the Court's granting the FCC's conditional cross-petition. Whether or not the Court believes the cross-petition is worthy of review, however, NAB's petition (04-1033) should be granted.

Respectfully submitted,

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